INDEX.

PAGE

Statement of the Case as to Error in the Construction of Article No. 2526 of the Civil Code of Panama and the Canal Zone 1

Statement of the Case as to the Absence of Necessary Parties on the Second Hearing, Herein Appealed From..... 10

ARGUMENT:

POINT I.—That the Court erred in adjudging and decreeing to defendant, Patterson, in a suit in equity between him and Dias alone the entire fund of $26,160.00, deposited in court, without citing and hearing the claims of the other claimants to said fund, referred to in the award of the Joint Land Commission of January 24th, 1919. The Court did not have before it the necessary parties for this purpose.. 18

POINT II.—The Circuit Court erred in its reversal of the decree in the first hearing and in its affirmance of the decree in the second hearing by reason of an erroneous construction of Article 2526 of the Civil Code of Panama and of the Canal Zone with reference to the acquisitive prescription of real property by means of a recorded title..... 24

STATUTES REFERRED TO:

Page

Sections 2526 and 2529 of the Civil Code of Panama in the Canal Zone..... 26, 27

AUTHORITIES CITED:

Award of Joint Land Commission, Record, pp. 141-142 10

Caldwell v. *Taggart*, 4th Peters, 190..... 22

Diaz v. *Patterson*, First decision, Trial Court 4, 18, 19

Diaz v. *Patterson*, Record, pp. 1120, 1121... 9

Nadal v. *May*, 233 U. S. 446..... 35

Panama R. R. v. *Bosse*, 249 U. S. 44..... 34

Panama R. R. v. *Toppin*, 255 U. S. 333.... 35

Patterson v. *Diaz*, 262 Fed. 899..... 1

Patterson v. *Diaz*, Circuit and Supreme Courts of the Republic of Panama..... 29

Roncau v. *Todd*, 206 U. S. 357..... 35

Story's Equity Jurisprudence, 4th Ed., Vol. 3, par. 1981..... 20

Story's Equity Pleading, 10th Ed., Para. 72 and 75..... 21

Supreme Court of the United States.

DOMINGO DIAS, *et al.*,
Appellants,
vs.
GUILLERMO PATTERSON.

October Term, 1922.
No. 118.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

BRIEF FOR APPELLANTS.

Statement of the Case as to Error in the Construction of Article No. 2526 of the Civil Code of Panama and the Canal Zone.

This is an appeal to this Court from the judgment and decree of the United States Circuit Court of Appeals for the Fifth Circuit, filed May 10th, 1922.

The suit was originally brought in the District Court of the Canal Zone in November, 1917, and was decided October 24th, 1918, in favor of the plaintiff therein, Domingo Dias, by the writer of this brief, who was then the judge of that court. From that judgment there was an appeal to the Circuit Court of Appeals for the Fifth Circuit, resulting in a reversal in an opinion of the Circuit Court of Appeals filed February 9th, 1920 (see *Patterson* v. *Dias*, 262 Fed. Rep., p. 899), the case being remanded for further proceedings not inconsistent with the opinion.

Pursuant to this reversal a second hearing was

had in the District Court of the Canal Zone before the Honorable John W. Hanan, the then Judge of said Court, resulting in a decision and decree in favor of the defendant Guillermo Patterson, filed May 27th, 1921 (see Record, pp. 54 to 76), and on appeal by Dias from this second decree the same was affirmed on May the 10th, 1922 (see Opinion, Circuit Court, Record, pp. 1122, 1123) and the case is now here on appeal from this affirmance by the Circuit Court of the decree in the second hearing.

The action was originally brought by Dias, *et al.* (hereinafter always referred to as "plaintiff" or "Dias"), against Guillermo Patterson (hereinafter always referred to as "defendant" or "Patterson"). Dias claimed to be the owner of an estate called "Lo de Caceras", lying partly in the Republic of Panama and partly in the Canal Zone, and pleaded that Patterson claimed to be the owner of an estate called Mata Redonda, which adjoined Caceras on the West, and that Patterson claims an interest in and to the portion of the real estate described in the tenth paragraph of the complaint, meaning the western portion, or that part of Caceras lying in the Canal Zone.

> "and plaintiffs allege that the claim of defendant is without any right whatever; that the defendant has not any estate, right, title or interest whatever in said land or premises, or any part thereof; that the defendant is out of possession and the plaintiffs are in possession of said premises; that the defendant has filed with the Joint Land Commission a claim to certain portion of the said tracts of land, the extent and area of which portion is unknown to plaintiffs" (Record, pp. 14, 15).

The Joint Land Commission was a joint commission appointed by the United States and the Republic of Panama to value lands expropriated by

the United States in the Canal Zone. The plaintiff thus asserted title and possession in himself and denied title and possession in the defendant; but asserted that, nevertheless, the action of defendant constituted a cloud upon his title, especially by the claim filed with the Joint Land Commission. The plaintiff, therefore, prayed as follows:

> "that the defendant be required to set forth the nature of his claim, *and that all adverse claims be determined by this Court*, that by said decree it be declared and adjudged that plaintiffs are the owners of said lands and entitled to the possession thereof; and that defendant has no estate or interest whatever in or to said land, and that defendant be forever barred from asserting any claim whatever in and to said land and premises adverse to plaintiffs. And for such other and further relief as to equity shall seem meet and proper" (First Record, p. 7).

To this demand the defendant answered:

> "that he is the owner in fee simple of that portion of the estate of Mata Redonda, situated in the Canal Zone, bounded and described as follows" (describing it.) "and that he, together with his predecessors in interest, have been in the open, exclusive, notorious, interrupted, continuous, hostile and adverse possession of the lands hereinbefore described since the year 1695, as is more fully shown by the instruments hereunto annexed, marked exhibits 'B2 to O.' inclusive, and made an integral part of this answer."

The defendant therefore prayed "that he be confirmed by decree of this Court in the ownership of the said lands and improvements; that the plaintiff recover nothing by this action."

The case thus presented was an equitable proceeding wherein each party claimed the disputed

area by title and each claimed to be in possession, and prayed to be protected in the enjoyment thereof.

For a full understanding of the case, it is necessary to refer briefly to the first hearing before the District Court of the Canal Zone, decided October 24th, 1918. The trial court on that hearing decided fully in favor of the plaintiff and decreed as he prayed. The Court found that:

> "the determination of the question here presented depends upon,
>
> *"First:* The location of Pena Hueca or Mata Redonda, referred to in the title deeds of both plaintiffs and defendant (meaning a decisive landmark).
>
> *"Second:* Whether or not the piece of property here in controversy has been acquired by prescription by one of the parties litigant, inasmuch as it appears that the said property in dispute is included within the description contained in the title deeds of plaintiffs and of defendants."

Caceras is the name of the estate of plaintiff and Mata Redonda the estate of defendant. The boundary between the two properties ran from Mata Redonda to a point called Macomba. Macomba not being in dispute the swaying of the landmark, Mata Redonda, one way or the other, makes the controversy and was one of the decisive points upon which the case was decided on the first hearing.

The trial court, on the first hearing, held with the plaintiff as to the location of the landmark, Mata Redonda, first, because the title deeds of an adjoining estate, San Jose, owned by the Arosemena family so located Mata Redonda, second, the preponderance of testimony, and, third, the characteristics of the place in dispute.

On the question of acquisition by prescription, the trial court stated:

> "First, both parties claim actual physical possession and there was proof tending to show actual physical possession in each of undetermined parts and at various periods.
>
> "Second, it is doubtful if actual physical possession of the whole is shown or can by legal requirements be shown in either by actual physical possession of parts."

Further, the Court said:

> "It seems clear to me that the enormous mass of testimony adduced by both parties relating to acts of possession of the soil on some undetermined and indefinite pieces of the land in dispute cannot help the Court in the determination of the issues involved" (Record, First Trial, p. 345).

The Court then stated:

> "From the foregoing it is evident that for the determination of the question of prescription it is necessary to examine the *recorded possession* which the parties may have to the lands in dispute."
>
> "The plaintiffs claim by reason of a certain title deed executed in 1832 wherein the boundary of Lo de Caceres on the side of Mata Redonda is a certain imaginary line from Mocambo Hill to the Mata Redonda. This line seems to be the one now claimed by said plaintiffs. The defendant on the other hand shows that he has title by a certain chain of conveyances starting from the 26th of March, 1859, down to 1891, where in the boundaries of Mata Redonda are given in a manner that is clearly in conflict with that given in the Lo de Caceres deed of 1832."

"The only way to decide the conflict that arose in 1859 is by bearing in mind section 2526 of the Civil Code, which reads as follows:

"The acquisitive prescription of real property or of real rights constituted therein does not obtain against a recorded title, except by virtue of another recorded title, nor shall it begin to run but from the date of the record of the second."

The section of the Civil Code No. 2526 above quoted is, and was at that time, the law prevailing in both the Canal Zone and the Republic of Panama.

The trial court on this first hearing then likewise held with the plaintiff on the question of title to the property in dispute, basing its conclusion on what is known as "registered" or "symbolic" possession as distinguished from actual possession under the laws of Panama and the Canal Zone, and stated, quoting from a decision of the Supreme Court of Colombia, as follows:

"If in a delineation suit one of the parties attempts to prove that he has been in possession of land in dispute by means of oral evidence and the other shows the same by means of a recorded instrument, the recorded instrument must prevail" (see First Record, p. 346).

As stated, the Circuit Court of Appeals reversed the decree of the District Court on this first hearing and for the following reasons as stated by the Court:

"Civ. Code Canal Zone, art. 2526, providing that 'the acquisitive prescription of real property does not obtain against a recorded title, except by virtue of another recorded title,' does not give the mere recording of a deed by one

claimant the effect of interrupting or rendering ineffective the actual possession of an adverse claimant, who holds under a previously recorded title."

And here we would call attention to the fact that the Circuit Court in quoting this Article 2526 omits therefrom the last part, which we think has an important bearing on the case, viz., "nor shall it begin to run but from the date of the record of the second." And further the Circuit Court said:

"The opinion rendered by the trial judge shows that the decree in favor of the plaintiffs resulted from the conclusion that, under the following provision of the Civil Code of the Canal Zone, the recording in 1895 of the conveyances under which the plaintiff's predecessor in title claimed had the effect,—though neither such claimant nor any one claiming through him got possession of the land in dispute, of preventing the acquisition by the defendant of the ownership of such land by the continuance thereafter of the possession commenced by a predecessor of the defendant, to which the latter succeeded when the deed to him was made and recorded in 1891, and from which he was not ousted."

"In view of the above-mentioned condition of the evidence adduced, the quoted part of the court's opinion plainly indicates that the case was disposed of on the theory that, assuming, without determining from the evidence adduced, that the defendant and those through whom he claimed had continuous and uninterrupted possession under claim of ownership for the length of time required to confer title by prescription, that possession was ineffective in his behalf from the date of the recording of a deed describing the land, made by an adverse claimant to a third person, though neither the grantee in such deed nor any one through whom he claimed, or who

claimed under him, acquired possession of any of the land described therein, and though the conveyances under which the defendant claimed were first recorded."

"It appears from the record that the decree appealed from was based upon the conclusion that the plaintiffs had acquired by prescription the ownership of the land sued for, without that land having been possessed by them or by any one through whom they claimed, and though their petition did not assert the claim that they were by prescription entitled to that land. The court erred in so concluding."

262 Fed. Rep. 899.

After this reversal by the Circuit Court, the trial court on the second hearing, May 27th, 1921, found the landmark of Mata Redonda or Pena Hueca as claimed by defendant Patterson (Record, p. 61), and also, following the decision of the Circuit Court, found title and possession in favor of Patterson in its finding No. 32 (Record, p. 72), as follows:

"As a final and ultimate fact the Court finds: that plaintiffs have established no title to, nor have plaintiffs ever been in possession of any of the lands in controversy in this action, but that the defendant and his predecessors in interest have established good, valid and recorded title to all of said property since the year 1695, and have been in actual, notorious, open, adverse and uninterrupted possession of all of the lands in controversy since the year 1790 until the present time."

This finding as to possession we will say was squarely in conflict with that of the Circuit Court of Appeals wherein it stated, as follows:

"There was no evidence to support a finding as to who was in possession of the land in dispute prior to 1869."

262 Fed. Rep., p. 899.

Nevertheless, such finding as to possession still left open, as we will attempt to show, the question as to the priority of Diaz' rights under Article 2526 relating to acquisitive prescription; and on appeal from the second hearing the Circuit Court on said second appeal reaffirmed its view of the law in this respect in its opinion filed, wherein the Court states:

> "The principal argument for reversal of the decree below is on the question of law decided upon the former appeal. It is again argued that the mere recording of a deed by one claimant interrupts the actual possession of an adverse claimant under a previously recorded title. We are convinced that this is not the law and adhere to our former opinion. The decree is affirmed."
>
> (Record, pp. 1120-1121.)

And so this question is here again presented; and we submit that both on the first and second appeals the Circuit Court erred in this respect. This is one of our assignments of error covered by Assignments Nos. 7 and 8 (Record, p. 1128), as follows:

> "7. Because the said decree is contrary to law and the prayer for relief of defendants' answer filed herein and is unsupported by the evidence introduced in the trial.
>
> "8. Because the said decree should have been in favor of the plaintiffs and against the defendant under the pleadings and proof submitted in the trial hereof."

Statement of the Case as to the Absence of Necessary Parties on the Second Hearing, Herein Appealed From.

On the second hearing before the trial court, there was introduced in the case a most important matter that was not before it at the first hearing and consequently not before the Circuit Court on the first appeal. To this we would call particular attention as we think it is decisive of the case before this Court, and clearly calls for a reversal. The facts in this respect are as follows:

At the time of the decision in the first hearing, there was then pending, but undetermined, before the Joint Land Commission a claim presented by the defendant, Patterson, in 1914, against the United States, for $625,000, for the alleged value of the Mata Redonda and Caceras properties, which had been appropriated by the United States, consisting of 1101 hectares, and the Joint Land Commission, after this decision of the District Court, to wit: on January 24th, 1919, rendered its award as follows:

> ". . . It is stipulated by counsel that the entire area known as 'Mata Redonda', subject to the present claim, consists of 1101 hectares. Of this area 565 hectares are the undisputed property of Guillermo Patterson, the above named claimant. The remaining 536 hectares are the subject of a dispute between the following parties:
>
> "1. Guillermo Patterson.
>
> "2. The Aleman Family consisting of Josefina Vallarino de Aleman, Jose Maria Aleman, and Adolfo Aleman, V., heirs of Adolfo Aleman, who are claimants in claim docket No. 3257, covering the property known as 'La Gloria'.

"3. The Arosemena Family consisting of Ernesto Arosemena, Carlos C. Arosemena, Florencio Arosemena, Dolores H. Arosemena, Hercillia D. Arosemena, Delia Arosemena de Uribe, who are claimants in claim docket No. 3737, covering the property known as 'San Jose'.

"4. Domingo Diaz, in his own name and as attorney in fact for Mrs. Elisa a vda. de Diaz, and Isabel Diaz de Jimenez, heirs of Domingo Diaz, claimant in claim docket No. 3260 covering the property known as 'Lo de Caceras'.

"After the termination of the trial of the case, and while the matter was still under submission before the Joint Commission, our attention was called to a stipulation signed by counsel for the interested parties, agreeing to the making of an award in the total sum of Six thousand dollars for the improvements on the lands above referred to, exclusive of pastures, and in accorance with this stipulation an award in the sum of Six Thousand dollars ($6,000.00) was made by the Commission on the 16th day of January, 1919.

"The Commission, after carefully considering the evidence submitted both by the claimant and the Government, and the awards heretofore made by the Commission, as at present constituted, has unanimously decided upon an award in the sum of Thirty-seven Thousand Two Hundred Eighty-five dollars ($37,285.) U. S. Currency. This amount is hereby directed by the Commission to be paid as follows:

"To Guillermo Patterson, claimant above named, the sum of Fourteen Thousand, One Hundred Twenty five dollars, $14,125.00, for all right, title and interest the said Guillermo Patterson may possess or may have possessed in and to the 565 hectares of the Mata Redonda estate not in dispute. described in claim docket No. 2565, including any and all damages, sustained on account of the expropriation of this property by the United States of America.

> "The sum of Twenty-three thousand one hundred sixty dollars, U. S. Currency, $23,160.00, representing the value of the lands embraced in the disputed area, consisting of 536 hectares including any and all damages sustained on account of the expropriation of this property by the United States of America, is hereby ordered deposited in the District Court of the Canal Zone, Balboa Division, to await the decision of said court as to the ownership thereof" (Record, pp. 140-142).

The additional damage sustained as referred to in the award was $3,000, thus making the total $26,120 (see Record, p. 139).

As stated, the award of the Joint Land Commission formed no part of the record of the first case before the Circuit Court wherein the judgment of the lower court was reversed (see *Patterson* v. *Diaz*, 262 Fed. Rep. 899). Nor was the question called to the attention of the court at that time.

The case came on for a second hearing in the District Court of the Canal Zone in May, 1921, and at that time the plaintiff Diaz filed an amended answer in which attention was specifically called to said award and prayed that the adverse claimants to the said sum of $126,160 be summoned, as follows:

> "Wherefore your petitioners pray that your Honor take cognizance hereof, and to that end summon all parties having or claiming to have any right, title or interest in and to the lands described in the Second Paragraph hereof, to be and appear before this Court on a day certain, then and there to assert their respective claims and demands against the said real estate, and to answer the allegations of this petition, and that upon final hearing hereof, your Honor will be pleased to decree, establish and confirm your petitioners in the absolute

ownership, right and title in fee simple in and to the said lands, *and to the fund heretofore deposited in the registry of this Court as the price thereof upon the expropriation by the United States*, and your petitioners further pray for their costs and for such other and further relief as to justice and equity shall appertain" (Record, p. 15).

For some reason which does not appear in the Record, these other adverse claimants to the fund were not made parties; and it should be noted that the defendant Patterson who had filed an amended answer and cross-petition to the amended complaint did not ask to have the adverse claimants to the fund cited, nor did he pray that the fund in question be adjudged to him. His prayer is simply that he be confirmed by decree of the Court in his ownership of said land and improvements and that the plaintiff recover nothing by this action (Record, p. 23).

The 7th Assignment of Error referred to herein embraces this point wherein it states that the decree adjudging the fund to Patterson is contrary to law, *and the prayer for relief of defendants' answer filed herein.*

The trial court on this second hearing of the case made special findings of fact and conclusions of law, which were filed on May 27th, 1921, and in No. 2 thereof, there appears a specific finding as to said award, thus showing that the same was expressly called to the attention of the court. The court in this respect found as follows:

"2. That pursuant to proceedings instituted before the Joint Commission, appointed and acting under the terms of the treaty between the United States and the Republic of Panama, the said Joint Commission, did, under

> date of January 24, 1919, make its award for the value of the property in dispute between plaintiffs, and defendant, above described, in the sum of $26,160.00; and it ordered said sum of $26,160., United States currency, paid into the registry of this Court, to abide the decision of this Court as to the ownership thereof" (Record, pp. 61, 62).

and then, having found title and possession of the property in Patterson, that is, as between Patterson and Diaz, the Court proceeded to adjudge and decree the entire trust fund of $26,160 to Patterson, notwithstanding the fact that there were other claimants to the fund, who had not been cited, and who had not been heard as to their claims thereto. In this respect the court decreed as follows:

> "And that defendant have judgment for the possession of *all of the funds or moneys* deposited in this Court by the United States of America through an award of the Joint Commission for the owner of the lands in dispute in this cause, for the lands and improvements, together with all of the interest thereon accrued and which may hereafter accrue, the original award for the land deposited in Court is Twenty-three thousand, one hundred and sixty dollars ($23,160) and for the improvements, Three thousand dollars ($3,000.00); United States currency,—together with all costs of this action" (Record, pp. 75, 76).

This was specifically alleged as one of the grounds for a new trial, in the motion filed therefor on behalf of Diaz, as follows:

> "Second: That the Court has ignored in its second finding of fact the proposition that the award mentioned therein involves property and improvements other than those actually involved in the trial of this cause, in this, to wit, that under the award of the Joint Com-

mission there were involved and there is involved in this action as evidenced by the decree of the Joint Commission the following claims, which have not been presented or finally adjudicated by the decree of this Court in the present cause, to wit, and reciting the wording of award No. 189, Docket No. 2565, made under date of January 24th, 1919, by the Joint Commission, acting and appointed pursuant to the treaty between the United States of America and the Republic of Panama wherein said award it is determined that of the property presently in dispute between the plaintiffs and defendant, the following parties are co-claimants and demandants.

"1. Guillermo Patterson, the claimant above named.

"2. The Aleman family, consisting of Josefina Vallarina de Aleman, Jose Maria Aleman, and Adolfo Aleman V., heirs of Adolfo Aleman, who are claimants in claim docket No. 3257, covering the property known as 'La Gloria.'

"3. The Arosemena family, consisting of Ernesto Arosemena, Carlos C. Arosemen, Florencia Arosemena, Dolores H. Arosemena, Hercilia D. Arosemena, Delia Arosemena de Uribe, who are claimants in claim docket No. 2757, covering the property known as 'San Jose.'

"4. Domingo Diaz A., in his own name and as attorney in fact for Mrs. Elicia A., vda. de Diaz, and Isabel Diaz de Jiminez, heirs of Domingo Diaz, claimant in claim docket No. 3260, covering the property known as 'Lo de Caceres.'

"And in addition to the foregoing, Award No. 188, made under date of January 16, 1919.

"And in this respect the finding of the Court in this cause is absolutely defective and awards to the party defendant the money and prop-

> erty of those who are not a party to this action, referring distinctly to the parties named in the above and foregoing awards of the Joint Commission" (Record, pp. 78, 79).

It was also among the assignments of error to the Circuit Court of Appeals on the appeal from the decree in the second hearing, as follows:

> *"Eleventh.* Because the Court erred in said decree wherein it is ordered that the full amount of $26,160.00, as set forth in the second finding of fact made by the Court, be paid to the said defendant, for the reason, that the awards mentioned in said finding of fact show on their face, there are other claimants to the said fund, who have never been made parties to this action, as will more fully appear from the copy of said awards hereto annexed, marked 'Exhibit C' as part of the Eleventh Assignment of Error" (Record, p. 120).

Nevertheless, the Court of Appeals affirmed the judgment on the second trial, in a short opinion, in which no reference is made to this most important point (see Record, p. 1120), and this is again assigned for error in this court, in Assignment No. 11 (Record, p. 1128), this assignment being in the words and figures of the assignment above quoted on the appeal to the Circuit Court.

And here we may be permitted to state, that the other claimants to this fund, namely, the families of Ernesto Arosemena and Adolfo Alemán have actually instituted proceedings in the District Court of the Canal Zone against Patterson, looking to a recovery of a portion of said fund, and said proceedings are still pending and undetermined. And we also call attention to the fact that the Minister of the Republic of Panama to the United States, the Hon. R. J. Alfaro, under date of No-

vember 8th, 1923, addressed to the Clerk of this Court the following communication upon the subject:

"LEGACION DE PANAMA,
Washington.

NOVIEMBRE 8 DE 1923.

THE CLERK OF THE
SUPREME COURT,
Washington, D. C.

DEAR SIR:—

In compliance with instructions cabled me by the Government of Panama, I beg to bring to your knowledge the fact that the families of Ernesto Arosemena and Adolfo Alemán have the intention of securing the services of a lawyer in Washington in order to intervene in the suit of Domingo Diaz *et al vs.* Guillermo Patterson. This suit affects the interests of said families who have not been heard, as they have not been parties to the suit.

The Government of Panama considers that it would be just to hear the Attorney for the above-named families before deciding the Diaz *vs.* Patterson case, and would like to see it happen, if it should be consistent with the laws of the United States.

I am, my dear Sir,

Yours very respectfully,

(Signed) R. J. ALFARO
Minister.

RJA:JB"

We will consider the two assignments of error above stated and herein relied upon in inverse order to that heretofore stated.

ARGUMENT.

The appellants, therefore, submit the following points and authorities:

I.

That the Court erred in adjudging and decreeing to defendant, Patterson, in a suit in equity between him and Diaz alone the entire fund of $26,160.00, deposited in court, without citing and hearing the claims of the other claimants to said fund, referred to in the award of the Joint Land Commission of January 24th, 1919. The Court did not have before it the necessary parties for this purpose.

We think there should be a reversal for this assignment alone. The first hearing in October, 1918, involved merely an equitable action as to the right and title to a certain tract of land and the protection of the interest therein of the parties thereto, namely, Diaz and Patterson, and did not have to do with any specific fund, because at that time the award of the Joint Land Commission heretofore referred to had not been made. But the second hearing involved not only the equitable action as to the land in dispute but the distribution of the equitable fund of $26,160 deposited in Court by the Joint Land Commission expressly for the purpose of being distributed among the parties claimants specifically designated in said award who might be found to be entitled to the same.

The court, we insist, could not dispose of that fund without having all the parties before it, and it had before it only two of the parties designated in the award as claimants of the fund, namely, Patterson and Diaz. Nor can it be successfully contended that because the trial court found the issues in favor of Patterson, Diaz was not prejudiced by the absence of the other parties and that he is, therefore, not in a position to take advantage of this manifest error. Because no one can say that upon a hearing, with all of the claimants before the court, additional proofs might not have been made that would enure to the detriment of Patterson and to the benefit of Diaz, as well as to the benefit of the other claimants. For instance, on the first hearing in the District Court, in 1918, the court found the location of Mata Redonda (which was one of the all-important questions in the case) in favor of Diaz, basing its finding largely on the conclusion that the title deeds of the Arosemena family to the adjoining estate of San Jose so proved. So, it is fair to presume that if the claimants to this adjoining estate, San Jose, had been made parties, on the second hearing, they might have materially strengthened the case of Diaz. At any rate, we say that a court of equity cannot dispose of an equitable fund, deposited in court to be distributed among certain designated claimants thereto, without having all of said claimants before it, and it was the duty of the court, on its own motion, to cite all the parties, when its attention was called to the matter. That it was called to the atention of the court is apparent from the prayer of the amended complaint and the motion for a new trial; as well as the finding and decree of the court and the award itself had been offered in evidence; and it was a matter of record in the case.

This view is abundantly supported by the authorities, and in fact, we have found no principle to the contrary either in the text writers or in reported cases.

In Story's "Equity Jurisprudence", 14th Ed., Vol. 3, Par. 1981, the principle is stated as follows:

> "¶ 1981. *The Want of Proper Parties to a Bill, as an Equitable Defence.*—The want of proper parties to a bill is also a good defence in equity, at least until the new parties are made, or a good reason shown why they are not made. At law a plea of the like nature is sometimes a good defence in bar, and is sometimes only a matter in abatement. But the plea in equity is of a far more extensive nature than at law; and it often applies where the objection would not at law have the slightest foundation. The direct and immediate parties having a legal interest are those only who can be required to be made parties in a suit at law. But Courts of Equity frequently require all persons who have remote and future interests, or equitable interests only, or who are directly affected by the decree, to be made parties; and they will not, if they are within the jurisdiction, and capable of being made parties, proceed to decide the cause without them. Hence it is that in Courts of Equity persons having very different and even opposite interests are often made parties defendant. It is the great object of Courts of Equity to put an end to litigation, and to settle if possible in a single suit, the rights of all parties interested or affected by the subject-matter in controversy. Hence the general rule in equity is, that all persons are to be made parties who are either legally or equitably interested in the subject-matter and result of the suit, however numerous they may be, if they are within the jurisdiction, and it is, in a general sense, practicable to do so."

Also in *Story's "Equity Pleading"*, 10th Ed., p. 74, Par. 72, we find the rule stated, as follows:

> "It is the constant aim of courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also, that future litigation may be prevented. Hence, the common expression that courts of equity delight to do justice, and not by halves. And hence, also, it is a general rule in equity (subject to certain exceptions, which will hereafter be noticed), that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however, numerous they may be, so that there may be a complete decree, which shall bind them all. By this means, the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of a multiplicity of suits, and to make it perfectly certain, that no injustice is done, either to the parties before it, or to others, who are interested in the subject-matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto."

And further, in Paragraph 75, page 77, *Story's "Equity Pleadings"*, it is stated as follows:

> "¶ 75. If the proper parties are not made, the defendant may either demur to the bill, or take the objection by way of plea or answer, or (subject to the considerations above suggested), when the cause comes on to a hearing,

he may object, that the proper parties are wanting; or, the court itself may state the objection, and refuse to proceed to make a decree; or, if a decree is made, it may, for this very defect, be reversed on a rehearing, or on an appeal; or if it be not reversed, yet it will bind none but the parties to the suit, and those claiming under them. So, that all the evils of fruitless or inadequate litigation may sometimes be visited upon the successful party in the original suit, by leaving his title still open to future question and controversy."

The same principle is clearly announced in *Caldwell* v. *Taggart*, 4th Peters, p. 190, as follows:

"Where a bill was filed to compel the execution of securities for money loaned, which securities, it was alleged in the bill, were promised to be given upon particular real estate purchased by the money loaned, and the complainants had omitted to make the prior mortgagees of the premises on which the securities were required to be given, parties to the bill, the court said; it has been urged in reply to those grounds of reversal for want of parties or for want of due maturation for a final hearing, that nothing is ordered to be mortgaged or sold besides the interest of the party who is ordered to execute the mortgage, or whose interest is to be sold, whatever that may be. But this we conceive to be an insufficient answer. It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decree should terminate and not instigate litigation. Its sales should tempt men to sober investment, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium of estimation. It has means of reducing every right to certainty and precision; and is therefore bound to employ these means in the exercise of its jurisdiction."

On pages 202, 203, the Court in its opinion states, as follows:

> "There is no want of learning in the books on this subject. The general rule is laid down thus; 'however numerous the persons interested in the subject of a suit, they must all be made parties plaintiffs or defendants, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit; to make the performance of the order perfectly safe to those who have to obey it, and to prevent future litigation.' And again, 'all persons are to be made parties who are legally or beneficially interested in the subject-matter and result of the suit;' extending in most cases to heirs at law, trustees, and executors."

On page 204, the Court uses this most significant language, which is especially applicable to the present case:

> . . . "There is no knowing what new aspect may be given to the cause, when all the necessary parties come in and answer."

Referring to the statement of the court in the above case to the effect that it is necessary in decrees in equity "to make the performance of the order perfectly safe to those who have to obey it", we may well ask, Could the officials of the District Court of the Canal Zone safely obey the order to pay over the entire trust fund of $26,160 to Patterson without difficulty and embarrassment, if not actual risk, in view of the fact that this fund was deposited for distribution among the claimants mentioned in the award of the Joint Land Commission who might establish their claims thereto, and, in view of the further fact that these other

claimants have actually instituted proceedings in the District Court of the Canal Zone seeking to recover portions of said fund?

In view of the foregoing we submit that the case should be reversed and remanded with directions to summon the other parties claimants to the fund as found by the Joint Land Commission and which was erroneously adjudged by the trial court exclusively to Patterson.

POINT II.

The Circuit Court erred in its reversal of the decree in the first hearing and in its affirmance of the decree in the second hearing by reason of an erroneous construction of Article 2526 of the Civil Code of Panama and of the Canal Zone with reference to the acquisitive prescription of real property by means of a recorded title.

Said Section 2626 is as follows:

> "The acquisitive prescription of real property or of real rights constituted therein, does not obtain against a recorded title, except by virtue of another recorded title, *nor shall it begin to run but from the date of the record of the second.*"

What the trial court on the first hearing decided in construing this Article was that the acquisitive prescription referred to therein always runs in favor of the last recorded title, that is, the one last on record will be considered for the purpose of

computing the Statute of Limitations on the trial of the case, and applying that rule to the facts of the case it held, starting with a registered title in favor of the predecessors of Diaz in 1832, that this *registered title* was defeated by one in favor of Patterson's predecessors in 1859 and another in favor of Patterson himself in 1891; and that these registered titles in favor of Patterson were in turn defeated by a still later registered title in favor of Diaz in 1895, which was the last on record when the suit was begun.

The Court held in substance, construing Article 2526 heretofore quoted, that the claim of Diaz was based on a recorded instrument of 1832 and that title by way of registered or constructive possession continued thereunder in favor of the predecessors of Diaz until the year 1859, when this was attacked and interrupted by a recorded instrument asserting a conflicting claim in favor of one of Patterson's predecessors, and that the recording of this latter instrument of 1859 would give title in ten years under Article 2529 of the Civil Code of Panama and the Canal Zone, which reads as follows:

> "Art. 2529. The time necessary for ordinary prescription is three years for movables, and ten years for real property. . . ."

and that Patterson's claim was strengthened by another registered title in his favor in 1891; but the Court also held that the registration of a subsequent deed in favor of the Diaz claim in 1895 interrupted the registered title and possession of Patterson under his deeds of 1859 and 1891, just as the Patterson deed of 1859 had interrupted the registered title and possession under the Diaz claim of 1832; and therefore inasmuch as suit was begun

by Diaz in 1917 and there being no further registration of title in opposition to Diaz from 1895 to 1917, that he, Diaz, was entitled under the ten years prescription of Article 2529 to a decree for the lands in dispute. The language of the trial court in this respect, part of which is set forth in the opinion of reversal of the Circuit Court, 262 Fed. 899, as follows:

> "This provision, taken together with section 2529 of the Civil Code which requires ten years for the acquisition of land by prescription, would have conferred on the defendant the ownership of the land in dispute by the year 1869. And this would be so because the prescription, as contemplated by the section just quoted, would begin to run not from 1832 (which is the date of the record of the first deed) but from the year 1859 (which is the date of the record of the second deed) inasmuch as the predecessors in interest of the plaintiffs had not during that period of prescription, interrupted the defendant's possession by means of another record.
>
> "There does not seem to be any doubt whatever that the defendant had acquired by 1869 by prescription a portion of the lands purchased in 1832 by the plaintiffs' predecessors in interest. But the question to decide is whether the title so acquired continues to the present time. We find that the last record effected by or on behalf of the defendant with reference to the lands in dispute took place in 1891. After that date neither the said defendant nor any one on his behalf has made any inscription on the Public Land Registry that would affect the recorded possession of the lands claimed. On the other hand we find that the plaintiff, by their predecessors in title reasserted their recorded possession of 1832, which they had lost by prescription, by means of the registration of the public sale of the estate of Lo de

Caceres that took place in 1895. In this public sale the old line of Mocambo to the Mata Redonda is again restated. Hence the conflict between the two estates reappears from the said year of 1895. Furthermore, after that year, several sales of undivided interests in the estate of Lo de Caceres took place and hence the corresponding inscriptions were affected, all of which show that public and open assertions of ownership, in the manner provided by law, were made by said plaintiffs or their predecessors in interest, in opposition to any and all claims of ownership of the defendant.

"The Court, therefore, finds that, applying section 2526 above quoted, prescription began to run in 1895 as against the recorded possession of the defendant; that the defendant has not interrupted that prescription inasmuch as he has no recorded title subsequent to 1891, and that as more than ten years have elapsed since 1895, the plaintiffs have reacquired the lands in dispute.

"The plaintiffs are, therefore, entitled to a decree in accordance with the above findings."

Therefore it appears that in the opinion on the first hearing it was held that the registered possession of Diaz under the Paredes deed of 1832, was interrupted and rendered ineffective by the opposing deed of 1859, some twenty-seven years thereafter, under which Patterson claims. In other words, the Court held that the deed by Patterson's predecessors of 1859, interrupted the registered possession arising from the deed of 1832 under which Diaz claims, and in so doing gave to Article 2526, exactly the same interpretation that was given to it in holding that the deed of 1895, under which Diaz claims uninterrupted the registered possession of the prior deeds, under which Patterson claims.

If, therefore, the court was wrong in holding the latter, that is, that the deed of 1895 interrupted the registered possession under the deed of 1891, then by the same token it was wrong in holding that the deed of 1859, under which Patterson claimed, interrupted the registered possession under the prior deed of 1832, under which Diaz claims, and the result would have been the same, namely, in favor of Diaz.

To put it otherwise, the Circuit Court of Appeals, in reversing the first case held that the mere recording of a deed by an adverse claimant does not have the effect under Article 2526 of interrupting or rendering ineffective the rights acquired under a previously recorded deed. In so doing we think the Circuit Court clearly overlooked that part of said Article which it failed to quote, and which says: "nor shall it (prescription) begin to run but from the date of the record of the second." But going back and applying this holding of the Circuit Court, the trial court would necessarily have decided that the deed of Patterson's predecessor of 1859, did not interrupt the rights of Diaz under his deed of 1832, in which case the result would have been, as stated, exactly the same.

The Circuit Court in its opinion said:

> "The provision (Art. 2526) cannot be given the effect of requiring a possessor to have a title recorded to enable him to acquire ownership by extraordinary prescription. To do so would be in the teeth of the following provision of the above set out Article 2531."
>
> "For the extraordinary prescription no title whatsoever is necessary."

The time necessary to acquire by extraordinary prescription is fixed by Article 2532 at thirty years.

But we say that this Article 2531 must be read in connection with Article 2526; and the only way for the two to stand together, without the one being directly in conflict with the other, and to give effect to both, is by adopting the construction that no title is necessary for extraordinary prescription *provided it is not attempted to be asserted against one who has a Recorded Title;* otherwise Article 2526 is nullified. And we respectfully insist that if it be true that the law is otherwise in this Country as stated by the Circuit Court, nevertheless it is the law of the Republic of Panama and consequently of the Canal Zone; and it has been so declared by the Circuit and the Supreme Courts of Panama.

And here let it be remembered that all of the registered instruments of title herein referred to were registered not in the Canal Zone but in the then Department of Panama, at that time a part of the Republic of Colombia, and some time before the revolution and the establishment of the Republic of Panama. Furthermore, let it be remembered that this is a suit between two Panamans and not between American citizens and that in taking the steps they did to protect their interests they naturally relied and had a right to rely upon the laws of the country as understood and interpreted in that respect.

This is of much importance in view of the fact that the Circuit Court and the Supreme Court of the Republic of Panama have construed the law as we contend for herein, and in a like suit between the same parties hereto, Diaz and Patterson, involving exactly the same issues of law and fact as to a portion of the land here in dispute situated within the Republic of Panama. These decisions will be found in full at pages 937 to 955 of the Record. The case referred to was decided by the

Circuit Court of Panama on January 23rd, 1919, in favor of Diaz and affirmed by the Supreme Court of Panama on the 19th day of May, 1920. As stated, the law with reference to said Article 2526 was therein construed exactly as we contend for herein. From these opinions we quote the following:

> "Said rights of prescription were or became good by registry of the title in the registry then existing, up to the year one thousand eight hundred and ninety-five, at which time the heirs of Ramon Garcia de Paredes sold at public auction the lands of Lo de Caceres under the boundaries given in the deed covering purchase sale executed by Pedro Miro in favor of Jose Garcia de Paredes, as the entry in the Registry of the title acquired at public auction interrupted the prescription of the titles of Mata Redonda in order to give said prescriptions in favor of the heirs of Ramon Garcia de Paredes, in accordance with the provisions of Article 2525 of the Colombian Civil Code, which read as follows:
>
> > "'The acquisitive prescription of real property or of real rights constituted therein does not obtain against a recorded title, except by virtue of another recorded title, nor shall it begin to run but from the date of the record of the second.'"
>
> "The title of Mata Redonda, which transmitted the ownership to Mr. Patterson, was recorded in the year one thousand eight hundred and ninety-one; and the title of Mr. Dias in the year one thousand eight hundred and ninety-five; both having reference to the same portion of lands, or, in other words, the lands comprised between the Mata Redonda and Mocambo in a straight line, and from Mata Redonda to the hill of the Algarrobo, and from this hill to Mocambo; the recording of the last title in the Registry interrupts the prescription of the first to transmit it to the second, and

as in this instance there has been no posterior interruption whatever, inasmuch as it was again recorded in the Public Registry created by Act 13 of 1913, it is unquestionable that in his favor there exist all the rights which the prescription gives as an acquisitive means of ownership; if said prescription is added to the rights accrued by virtue of the title of purchase sale of Jose Garcia de Paredes, the legal conclusion is reached that the heirs of Gen. Domingo Diaz hold the true ownership of the lands in dispute, inasmuch as the posterior reregistration of the title of Guillermo Patterson lacks legal value in the presence of Article 15 of Act 10 of 1913, according to which, registration of a title of ownership to a piece of property being made, no other title in conflict therewith may be recorded; and if said registration should be made, a marginal note shall be entered calling attention to the error for the cancellation of said last registration."

The Supreme Court of the Republic of Panama in affirming this decision of the Circuit Court, states as follows:

. . . "So, then, in the year one thousand eight hundred and ninety-five, some years after the acquisition by Patterson of the Mata Redonda, and the recording of the title of Patterson in the old Property Registry, there was recorded in favor of Catalina Lewis de Garcia de Paredes the proceedings by which said lady sold at public auction the property of Lo de Caceres under boundaries which start from La Mata Redonda (the round bush), in a straight line to the limits of Mocambo. This registration was in conflict with the registration theretofore made of the title of Patterson of one thousand eight hundred and ninety-one, registration of which, although conflicting and without the last title proceeding from the proprietor, according to the former title, was at

that time permitted by law. Wherefore, dating from one thousand eight hundred and ninety-five, Catalina Lewis de Garcia de Paredes and those holding under her (derivatives) commenced to prescribe ordinarily as against Patterson the portion of land englobed in favor of the property Lo de Caceres by the boundary which in one thousand eight hundred and thirty-two Pedro Miro had drawn, and by which the public sale was made in one thousand eight hundred and ninety-five. And this being so, the plaintiffs, Diaz Arosemena, have today to their advantage, and not Patterson, the plea of ordinary prescription alleged by both parties; because it is evident that no one prescribes against one who has followed said person in the registration of a title executed under legal formalities, but that, on the contrary, it is the owner of the last title recorded who can acquire by ordinary prescription that which was theretofore recorded in favor of a third party from whom he does not derive the ownership title (Art. 2525 of the old Civil Code). This happens because prescription is one of the means of acquiring things which have not a known owner, and also the means of extinguishing the ownership and obligations belonging to another, to such an extent that the true owner loses by prescription his right, acquiring the thing the person who in good faith acquires a title in due form and records it, and so if in one thousand eight hundred and thirty-two Pedro Miro separated from Mata Redonda, belonging to his wife, the piece of land now in dispute, in order to include it in the property of Lo de Caceres, belonging to him, with the registration of the title of that date in favor of Ramon Garcia de Paredes, the latter began to prescribe as against the wife of Miro the ownership of the piece of land segregated, unless it be true that there did take place the alleged lawsuit between Garcia de Paredes and Mrs. Josefa Miro, widow of Gomes,

and that said lawsuit had been brought in time to interrupt the prescription period; if in one thousand eight hundred and ninety-one Patterson acquired and recorded his title by boundaries which took from the property of Lo de Caceres a part of that which Garcia de Paredes had acquired from Miro, Patterson would have prescribed against Garcia de Paredes if his title had continued without contradiction during the legal period for the purpose of acquiring by ordinary prescription, and, lastly, there having been recorded in one thousand eight hundred and ninety-five the public sale proceedings in favor of Catalina Lewis de Garcia de Paredes, which contradicts the title of Patterson, and restores the boundaries given by Miro in one thousand eight hundred and thirty-two. With this new registration there was initiated in favor of said lady and against Patterson the acquisitive prescription of the globe of land which, according to the exempted crown lands, formed part of Pena Hueca and not of Lo de Caceres. And since, dating from one thousand eight hundred and ninety-five up to the establishment in one thousand nine hundred and thirteen of the new Public Registry, no title has been recorded contradicting the title now figuring by successive traditions of ownership in favor of plaintiffs Diaz Arosemena, it is plain that acquisitive prescription is in favor of these plaintiffs" (Record, pp. 937-955).

Although the decisions of the Panama courts above quoted may not be strictly speaking *res judicata* as to the present case because the subject-matter was not exactly the same, the property in dispute therein being, as stated, an adjoining portion thereof in the Republic of Panama, we insist that these decisions should have great weight in the determination of the case. But so far from

looking to such final judgment for aid as to the facts or the law, as should have been done in order to carry out the treaty obligations of this country with Panama, the trial court declared with reference thereto:

> "We are trying the case here and not under the laws of Panama" (Record, p. 165).

We contend that the trial court and the Circuit Court of Appeals should have given to the construction of Article 2526 of the Civil Code, the construction given thereto by the Supreme Court of Panama, in an action between the same parties, involving exactly the same questions of law and fact, because the laws of Panama are the laws of the Canal Zone and the construction given thereto should be followed in the United States courts. This principle was held by this Court in the case of *Panama Railroad* v. *Bosse*, 249 U. S. 44, wherein Mr. Justice Holmes states as follows:

> "By the Act of Congress of April 28, 1904, Chap. 1758, Sec. 2, 33 Stat. at L. 429, temporary powers of government over the Canal Zone were vested in such persons and were to be executed in such manner as the President should direct. An executive order of the President addressed to the Secretary of War on March 8, 1904, directed that the power of the Isthmian Commission should be exercised under the Secretary's direction. The order contained this passage: 'The laws of the land, with which the inhabitants are familiar, and which were in force on February 26th, 1904, will continue in force in the Canal Zone until altered or annulled by the said Commission'; with power to the Commission to legislate, subject to approval by the Secretary. This was construed to keep in force the Civil Code of the Republic of Panama, which was translated

into English and published (44) by the Isthmian Canal Commission in 1905. By the Act of Congress of August 24, 1912, Chap. 390, Sec. 2, 37 Stat. at L. 560, Comp. Stat. 1916, Sec. 10,038, 'all laws, orders, regulations and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide'. On these facts it is argued that the defendant's liability is governed by the Civil Code alone, as it would be construed in countries where the civil law prevails, and that, so construed, the Code does not sanction the application of the rule *respondeat superior* to the present case."

Also in *Panama Railroad* v. *Toppin*, 252 U. S. 331, wherein Mr. Justice Brandeis states, as follows:

"The law of Panama is pleaded by both parties and evidence thereon was introduced by both; but we are not limited to this evidence, as they agree that we may take judicial notice of the law of Panama existing February 26, 1904, when the Canal Treaty was proclaimed, and that, in the absence of evidence to the contrary, the law then prevailing there will be presumed to have continued in force."

Furthermore, the same principle has been repeatedly held by the Supreme Court, in cases which involve the construction of the laws of Porto Rico. See *Romeu* v. *Todd*, 206 U. S. 357; also *Nadal* v. *May*, 233 U. S. 446, where the Court states as follows:

"Decisions of the Supreme Court of Porto Rico that the Civil Code of March 1st, 1902, went into effect on July 1, 1902, would be followed by the Federal Supreme Court as having

> become a rule of property, even if the latter court did not think, as it does, that probably the certificates of the Secretary of Porto Rico express the Legislative will. 'It is impossible to know how many or how important transactions may have taken place on the faith of these repeated solemn assurances, and apart from the general unwillingness of this court to over-rule the local tribunals upon matters of purely local concern, it is not too much to say that the decisions have become a rule of property, even if we did not think, as we do, that probably the Secretary's certificate expressed the Legislative will."

In fact, it has often been held that the Federal Courts will give to contracts and rules of property the construction that has been put upon state laws in this respect by the courts of those states. All the more should it give to the construction of a Panama statute that which has been given to it by the Supreme Court of that Republic, especially in dealing with real property claimed exclusively by two Panaman subjects such as Dias and Patterson and not citizens of the United States, and who undoubtedly had a right to rely as to their conduct upon the laws prevailing as construed by their own courts.

Under the authorities of these decisions this case should be reversed, because here, as in the Porto Rico cases, it may be said that the construction of Section 2526 of the Civil Code constituted a rule of property upon which Dias relied, and upon which his predecessors relied, when the deed of 1895 was recorded; and under these decisions Dias and his predecessors had the right to assume, according to the law as interpreted by their courts, that the steps they took stopped the running of the statute of limitations under the deed of Patterson of 1891.

To hold otherwise would be to interfere with vested rights of property according to the interpretation of the laws of that country. For, it must be remembered, that although Mr. Justice Holmes stated in his opinion in the *Bosse* case that the Canal Zone is peopled entirely by Americans, Patterson and Diaz are both Panamenas, and that their property in the Canal Zone had not been taken over by the United States, when they recorded their deeds as herein stated. And even if in cases between Americans, the laws of Panama should be given a construction as far as possible in accordance with our understanding thereof; still in cases between Panamenans where their property interests are concerned, a construction of the laws should be given in accordance with the interpretation placed thereon by their own courts, because such is the rule under which they acted and upon which they had a right to rely.

In conclusion we say it is manifest that the Court below decided the case on an erroneous construction of Article 2526 of the Civil Code; that out of deference to the decisions of the courts of Panama construing this same Article, and in justice to Diaz who relied upon the laws as understood in his country as a rule of property, the case should be reversed. For the reasons heretofore stated, it is therefore respectfully submitted:

First, the case should be reversed and the decree should be in favor of Diaz by reason of the law of acquisitive prescription arising from the priority and legal effect of the registration of his titles pursuant to Sec. 2526 of the Civil Code of Panama and the Canal Zone. Second, if not so ordered, then the case should be remanded with instructions to summon

and make parties thereto the other claimants to the trust fund of $26,160 now deposited with the District Court of the Canal Zone pursuant to the award of the Joint Land Commission on January 24th, 1919.

Respectfully submitted,

WILLIAM H. JACKSON,
Attorney for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 113

DOMINGO DIAZ, ET ALS.,

Appellants,

versus

GUILLERMO PATTERSON,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

SUPPLEMENTAL BRIEF IN BEHALF OF GUILLERMO PATTERSON, DEFENDANT AND APPELLEE.

There is very little that can be added to our brief written on the motion to dismiss or affirm without going into a discussion of the title and possession of the property in question contained in the 1152 pages of the transcript.

Inasmuch as this case was twice decided by the U. S. Circuit Court of Appeal in the case of *Patterson v. Diaz, 262-F, 903, 904,* and *Patterson and Diaz v. Patterson, 281-F, 394,* we are very loath to discuss at length the merits of the case.

The titles of the property in defendant and his authors date back to A. D. 1695. Rec., 68, 69.

When it was first appealed to the U. S. Court of Appeals, the opinion of the trial Judge, Wm. H. Jackson, showed that if the defendants had not uninterrupted possession of the property, that at least he had acquired by prescription in 1869 the land purchased by defendant's authors in 1832.

He said:

> "There does not seem to be any doubt whatever that defendant had acquired by 1869, by prescription, a portion of the lands purchased in 1832 by the plaintiffs' predecessors in interest. But the question to decide is whether the title so acquired continues to the present time. We find that the last record effected by, or on behalf of the defendant, with reference to the lands in dispute took place in 1891. After that date neither the said defendant, nor any one in his behalf, has made any inscription on the Public Land Registry that would affect the recorded possession of the lands claimed. On the other hand, we find that the plaintiff, by their predecessors in title, reasserted their recorded possession of 1832, which they had lost by prescription, by means of the registration

of the public sale of the estate of Lo de Caceres that took place in 1895. In this public sale, the old line of Mocambo to the Mata Redonda is again restated. Hence, the conflict between the two estates reappears from the said year of 1895. Furthermore, after that year several sales of undivided interests in the estate of Lo de Caceres took place and, hence, the corresponding inscriptions were affected, all of which show that public and open assertions of ownership, in the manner provided by law, were made by said plaintiffs or their predecessors in interest, in opposition to any and all claims of ownership of the defendant.

"The Court, therefore, finds that, applying Section 2526, above quoted, prescription begins to run in 1895, as against the recorded possession of the defendant; that the defendant has not interrupted that prescription, inasmuch as he has no recorded title subsequent to 1891, and that as more than ten years have elapsed since 1895, the plaintiffs have reacquired the lands in dispute." *(Patterson v. Diaz, 262 Fed., 900-901.)*

This opinion of Judge Jackson is missing in the present transcript, though it covered about twelve pages of the transcript upon the first appeal.

The Court of Appeals said regarding that opinion:

"It appears from the record that the decree appealed from was based upon the conclusion that the plaintiffs had acquired by prescription the ownership of the land sued for without that land having been possessed by them or by any one through whom they claimed, and through their petition did not assert the claim that they were by prescription

entitled to that land. The Court erred in so concluding."

Patterson v. Diaz, 262-F, 903.

The case was remanded in order to have the ownership and possession, with proper boundaries fixed, in accordance with the decree.

On the second hearing before the trial Court a great deal of new evidence was taken, and the trial Judge found the facts, after going over all the evidence, to be as shown in the transcript in this case from pages 61 to and including part of page 73.

Among the facts found, we will say here, that the trial Judge found the ultimate facts to be as follows:

"As a final and ultimate fact the Court finds that plaintiffs have established no title to, nor have plaintiffs ever been in possession of any of the lands in controversy in this action, but that the defendant and his predecessors in interest have established good, valid and recorded title to all of said property since the year 1695, and have been in actual, notorious, open, adverse and uninterrupted possession of all of the lands in controversy since the year 1790, until the present time.

"The Court also finds, as a matter of fact, that for more than ten years from the date of the deed of 1895, whereby the heirs of Ramon G. de Paredes attempted to convey the lands in controversy, and recorded a title thereto adverse to that of defendant, plaintiffs instituted no action, and made no attempt to eject defendant from the lands then in

possession of defendant, and claimed by plaintiffs under said deed; nor was any such action brought by plaintiffs until the year 1917." (Pp., 72, 73.)

And as a conclusion of law the Court found:

"That defendant has a good and sufficient recorded title to all of the property claimed by him in his answer to the amended complaint; that is to say:

"To that property starting from the Mata Redonda, or Pena Hueca, above described and located, to a point on the Canal Zone boundary line between monuments 86 and 87; thence, in a northwesterly direction to a spot where the Canal Zone boundary line crosses the river Cardenas at Monument 80; thence in a southerly direction, following the course down stream on the river Cardenas to a place where the Palangana river empties into it, then following the course of the Rio Palengana upstream until its junction with the Platanar Creek or river; then following the course of the Platanar, upstream, to its head waters already indicated and located; and from thence in a straight line to the Pena Hueca of Mata Redonda, the point of starting.

"That defendant has a good and perfect title by prescription to all of the following described lands; that is to say:

"From the spot called Pena Hueca, Mata Redonda, following the Old Porto Bello trail, or fence line of the defendant, as indicated on plaintiffs' exhibit 2 to Canal Zone boundary Monument 88; and from thence, following the said Canal Zone boundary to the Cardenas river at Canal Zone boundary Monument 80; then following the Car-

denas river down stream to its junction with the Palangana; thence following the Palangana river upstream to its junction with the Rio Platanar; from thence following the Rio Platana to its head waters; and from thence a straight line to the Pena Hueca, or Mata Redonda, the point of starting.

"That all of plaintiffs' caim is *res adjudicata*, having been fully decided in favor of defendant and against paintiffs by a Court of the Kingdom of Spain in the year 1790, in a suit between predecessors in interest of plaintiffs and defendant, which said judgment was confirmed by a Court of the Republic of Colombia of June 14, 1841, in a litigation between the predecessors at interest of plaintiffs and defendant, involving the ownership, title and right of possession of all the lands now in dispute; said judgment having never been reversed or modified or appealed, and being in full force and effect binding upon the parties hereto, and binding upon this Court in an adjudication of this cause.

"That by reason of failing to bring any action against defendant for a period of more than ten years from date of their deed of 1895 against defendant, who was in possession of the land in controversy under a recorded title, plaintiffs have lost by limitation any rights to bring an action against defendant for possession of any of the lands in controversy.

"That defendant has a good right and title, and is entitled to immediate possession of all the money and funds in this Court, together with accrued interest thereon by the United States of America,

through an award of the joint commission to the owner or owners of the lands in controversy." (P., 73.)

On the second appeal the Court said:

"The case is fully stated in 262 Fed., 890, upon a former appeal. There is a decree in favor of the original plaintiffs, and present appellants was reversed, and the case remanded for findings upon the evidence as to possession of the land in dispute.

"Upon the evidence, then, in the record, and upon additional evidence taken since, the trial Court has found that the original defendant, Patterson, appellee here, has been in actual, adverse possession for more than 30 years, and, further, that appellants have never been in possession of the lands in dispute. The Court also finds as a fact that appellee established record title.

"Appellants do not assign error upon the finding that record title is in appellee, nor is it seriously contended that there was not testimony to support the other findings of fact. Some contention is made as to the credibility of witnesses for appellants, but the District Judge heard the witnesses testify, and also viewed the lands. There is abundant evidence to support the finding of fact as to appellee's possession, but no useful purpose would be served by setting it forth. The principal argument for reversal of the decree below is upon the question of law decided upon the former appeal. It is again argued that the mere recording of a deed by one claimant interrupts the actual possession of an adverse claimant under a previously recorded title. We are convinced that this is not the law, and ad-

here to our former opinion. The decree is affirmed."

Patterson v. Diaz, 281 Fed., 394.

THE MERITS.

Your Honors will notice that the twenty-fourth finding of fact is not excepted to by appellant. That finding reads as follows:

> "24. The Court finds, as a matter of fact, that defendant has established recorded title to all of the lands in controversy from the present time by an unbroken chain of title to the original grant from the Spanish crown made to Mrs. Tomasa Ramos, defendant's predecessor in interest, in the year 1695."

This is noticed by the learned Judge of the U. S. Circuit Court of Appeals when he says:

> "The Court finds, as a fact, that the appellee established a record title. Appellants do not assign error upon the finding that record title is in appellee, nor is it seriously contended there was no testimony to support the other findings of of fact."
>
> *Diaz, et al. v. Patterson, 281 Fed., 394.*

Two Courts have reached the same conclusion on a question of fact, and the finding will not be disturbed.

Duirning v. Carlisle Packing Co., 226 U. S., 102.
Texas & Pacific Co. v. Prater, 229 U. S., 177.
Stuart v. Hayden, 169 U. S., 1.
Bodkin v. Edwards, 255 U. S., 223.

The Supreme Court of Panama, in an action of trespass as to **part of the identical tract of land in question,** decided that the possession of Mata Rodonda ranch, situated out of the Canal Zone, but in the Republic of Panama, in a trespass suit brought by Diaz, up to the Porto Bello road has been in Mr. Patterson for a long period of time.

The Panama Court said:

> "By the testimony of witnesses, which is of record, and presented as proofs regarding the damages, it appears on its face that the fence and other constructions about which the complainants complain, **have been made many years ago, which goes to establish the incompetency of the proposed action."** (Record, 748.)

In this case the judgment of the lower Court was reversed, and naturally so, since the so-called fence or other constructions seem to have been constructed as far back as 1854.

The Court will bear in mind, however, that the decision of the Supreme Court of Panama was based upon the same laws, the same Code of Procedure and Civil Code as are the laws of the Canal Zone, the decree of the Supreme Court relating, however, only to land outside of the Canal Zone. However, if the Portobello road marked the boundary between the two pantations outside of the Canal Zone and in the Republic of Panama, it would not be stretching the imagination too far to conclude that the same boundary in the Canal Zone would have been recognized by that Court.

The possession of all of Mata Redonda west of Portobello road has never been disputed by anybody, as we have stated before. Even Diaz, in his statement as to what grounds were in dispute, attempts to draw a straight line "from the lower Mata Redonda, etc." (Rec., 771.)

On page 772 he says:

> "That the Mata Redonda indicated was the one at the letter "Y" on defendant's Exhibit "X," and that by that designation that he had been very generous to Mr. Patterson."

When a man goes to outline a disputed claim to be settled, he generally claims all he can get, and Mr. Diaz knew, and knows now, and every other man in that section has known, that the Mata Redonda referred to was the one near the Portobello road.

Upon the subject of possession we have only one other thing to say, and that is that possession is proved by all the evidence in the record of the tenants who are paying rent to Mr. Patterson.

Again, in 1890, plaintiff brought suit for possession of part of Mata Redonda, and judgment was rendered by the Court of the Republic of Panama in favor of Mr. Patterson. (Record, 779, 780.)

So conclusive is the proof of the title of defendant, which runs back, without a flaw, to 1695, and his right of ownership by ordinary prescription (10 years) by virtue of title

translative of property in 1876 and in 1884 and in 1887 and in 1891; and his right of ownership by extraordinary prescription by virtue of open and adverse possession, having the possession under fence for over thirty years.

Without delving into this enormous record, if the Court should attach any weight to the testimony of the United States officer, Captain Malmsberry, who surveyed this land for the government to expropriate, it can read the following extracts from his testimony:

> "* * * that their names were placed on the map because the government had to pay all of them, as the department of law settled with all of them for their improvements; that he had talked with the cultivators who were on the property; that none of these people had any question as to who was the owner, as they all paid rent to Mr. Patterson, and always had to pay rent to him; that a good many of these people who paid rent to Mr. Patterson were on that portion of the estate of Mata Redonda lying north of a line drawn from what Mr. Diaz claimed to be the Mata Redonda, or the point marked "B" on the map to Mocambo, and a few were below the line." * * * (Rec., 666.)
>
> "that all the people marked on the map who were within the boundaries of the entire tract shown on the map marked "X" to be the Mata Redonda, paid rent to Mr. Patterson; that if anyone living on that property paid rent to anyone other than Mr. Patterson they were unable to locate them; that they located all that had improve-

ments on this property, though they might have overlooked one or two small ones; that some of the properties these people had were ancient; some of them were in the place marked "B" to "Y," where the land had been cultivated so much that it had simply become sterile and they had quit cultivating, particularly back of the old church (indicating the land in the vicinity of the point marked "B" on the map); that he observed houses or fincas of people who lived north of the line from "Y" to Mocambo; that the places around that old church seemed to be ancient and had been cultivated so much for years, that they had lost their fertility; that he did not know how long the people had been there; that the fence marked "Y" to "Z", when he was there in 1913, was down in some places, but the general line of it could be easily followed out; it was an old fence, I don't know how old, but it was partly a growing fence and partly posts and wires; that it impressed him as being a boundary line fence; that there is an old path that used to run along the fence, and that old trail could still be picked out; that it was an actual boundary line, whether it was legally correct or not he did not know; that that was the boundary line between Lo de Caceres and Mata Redonda." * * * (Rec. 667.)

We now come to what we think would, under ordinary circumstances, induce any Court to affirm the judgment in this case on the merits without reading any testimony, but on the statement and opinion of the first trial Judge who was reversed by the Court of Appeals in *262 Fed., 903, 904.*

One of the first glaring errors which the trial Judge fell into was the location, or rather **mislocation**, of the Mata Redonda. The testimony of witnesses conclusively shows that the only Mata Redonda is the one which forms the corner of the plantation at the Portobello road. This Mata Redonda is east of the Rio Hondo.

The first trial Judge of the lower Court, who was reversed, says that the Mata Redonda or Pena Hueca referred to in the San Jose deeds, is situated close to the ruins of the old chapel of Mata Redonda, a considerable distance to the west of the Rio Hondo. The Court says:

> "The title deed of the adjoining estate of San Jose seems to show conclusively that the said spot is located as herein indicated, and not on the Panama side of the Rio Hondo; that is, the eastern side. The title of San Jose of 1826 described a certain pass or crossing of the said river, and in doing so, states that it is 'the place used for crossing the Rio Hondo in going from this city (Panama City) to Mata Redonda.' In other words, in order to locate Mata Redonda, if we are guided by the description just quoted, it is necessary to go to the western side of the Rio Hondo."

This statement of the Judge who first tried the case is absolutely misleading, because the learned Judge does not quote all of the paragraph. The title says, speaking of the boundary:

> "Parallel to the royal crossing of the said river Hondo, at the place where it is crossed, in order to go from this city to Mata Redonda, and continu-

> ing in a straight line to the said crossing, they (the boundaries) go on later along the Royal road of Mata Redonda, already mentioned, to a creek, etc."

But the entire statement of this Judge and his opinion have, for some reason, been omitted from the record in this appeal.

The words "Mata Redonda" naturally refer, in both instances, to the estate of Mata Redonda, and the crossing of the Royal Road is where the river near is crossed in order to go to the house, which existed in the estate in 1826.

Again, the Judge referred to the title deed of 1846 and said that it is admitted by that title deed, introduced in evidence by the defendant, that the Mata Redonda is on the other side, or western side, of the Rio Hondo.

The San Jose title of 1846 does not bear out that Judge in this statement. It contains the following decisive statement, omitted from the paragraph partially quoted by his Honor:

> "Which point (the headwaters of the River Hondo) is on the right-hand side coming along the road, leaving the estate of Mata Redonda to meet the highway from the Portobello road to this city, which passes between the estates of the Mata Redonda and Lo de Caceres." (P. 1111.)

The Court missed the significance of the statement that the Portobello road passed between the estates of the Mata

Redonda and Lo de Caceres, as the corner landmark between the estates of Mata Redonda and Lo de Caceres was the Mata Redonda or Pena Hueca; naturally, this spot must be on or near the Portobello road, and to be in that point had to be east of the Rio Hondo.

The Court also missed the significance of certain correspondence in the record.

For instance, Mr. Valentine E. Bruno, writing as the lawyer for Domingo Diaz and Alleman, addressed Mr. Patterson regarding some controversy concerning the opening of a trail which he thought impinged upon the La Gloria property. He said:

> "You are doubtless laboring under the mistaken notion that the wire fencing along which the trail is cut forms the northern boundary of 'La Gloria.' For your information and guidance, however, I have to advise you that this is not so; the northern boundary of this property (speaking of La Gloria) is more than one hundred meters further north, that is to say, along the 'Paso Real' and up to the point where it crosses the 'Rio Hondo' in accordance with the titles of 'Lo de Caceres.'" (Record, p. 640.)

If your Honors will look at the map you will see that La Gloria never extended to the west of the Rio Hondo and, therefore, that the imaginary location of a Mata Redonda two miles west of La Gloria and two miles west of the Rio Hondo is an absurdity on its face.

We wish to go just a tiny bit further in reference to the correspondence in this case.

In 1913, the learned counsel who now represents Mr. Domingo Diaz, then acting as the attorney for Mr. Patterson, wrote a letter to Mr. Bruno, in reply to the letter above referred to, and said:

> "With reference to the boundary line between Mata Redonda and La Gloria, I am instructed to state that the southern boundary of the former is about one hundred feet south of the wire fence that was put there about twenty years ago by Mr. Patterson and not by Mr. Alleman, as you state—*i. e.*, a straight line from the Mata Redonda to the headwaters of the Platanar Creek, crossing Rio Hondo somewhere near the Paso Real." (Record, 642.)

If, as contended, the division line between La Gloria and Mata Redonda plantations ran from the Mata Redonda in a straight line to the headwaters of the Platanar Creek, crossing the Rio Hondo somewhere near the Paso Real, this makes the location of the imaginary Mata Redonda, west of the "Rio Hondo," so absurd and ridiculous that we do not think any Court will consider it.

While we cannot agree with any of the statements of fact in the opinion of the first trial Judge except, perhaps, his statement, the defendants have been in possession of the property in question in this case since 1832, it is a question of law, which will astound the Court and assure the reversal of his judgment, viz., the interpretation by the

learned Judge, who first tried this case, of Article 2526 of the Civil Code of the Canal Zone, which we have just cited to your Honors in this brief.

The Court said that this article, taken in conjunction with Art. 2529 of the Civil Code, which requires "ten years for acquisition of land by prescription," would have conferred on the defendant ownership of the land in dispute by the year 1869. And this would be so because the prescription, as contemplated by the section just quoted, would begin to run, not from 1832 (which would be the date of the record of the first deed, if it had been recorded), but from the year 1859 (which is the date of the record of the second deed), inasmuch as the predecessors in interest of the plaintiff had not, during that period of prescription, interrupted the defendant's possession by means of another record.

The first trial Judge said:

> "There does not seem to be any doubt whatever that the defendant had acquired by 1869, by prescription, a portion of the lands purchased in 1832 by the plaintiff's predecessors in interest. But the question to decide is whether the title so acquired continues to the present time."
>
> *Patterson v. Diaz, 262 Fed., 900.*

Then he said further (and here we come to the most remarkable statement that we have ever seen made by a Court of Justice):

> "We find that the last record effected by or on behalf of the defendant with reference to the

lands in dispute took place in 1891. After that date neither the defendant nor any one on his behalf has made any inscription on the Public Land Registry that would effect the recorded possession of the lands claimed. On the other hand, we find that the plaintiffs, by their predecessors in title, reasserted their recorded possession of 1832, **WHICH THEY HAD LOST BY PRESCRIPTION** by the means of registration of the public sale of the estate of Lo de Caceres, that took place in 1895."

Patterson v. Díaz, 262 Fed., 901.

In other words, Mr. Patterson had a perfect title through his deeds running from 1695 to the present day.

Mr. Patterson had a perfect title running from the purchase of Zayas, Saintbois Duque and his own purchases, all of which three titles are dated between 1876 and 1891, all of which were translative of property and gave him the ordinary prescription of ten years.

Mr. Patterson had a perfect title through his adverse possession, whether in good faith or bad faith, from 1832, but all of this was lost, and his recorded possession canceled, because another person, without taking or interfering with the possession of the property, had registered an adverse title in the office where the registry of conveyances should be made. The lower Court, in the first trial, overlooked *Article 789, C. C. of the Canal Zone*, which says:

"In order that registered possession may cease, it is necessary that the record be canceled, etc."

Under Judge Jackson's brilliant decision, anyone taking a fancy to a piece of property might make registry of a fictitious purchase of it in the Conveyance Office from somebody who never had title, and thus do away with both the effects of a valid purchase or of title otherwise acquired according to the laws of the land.

We shall not refer your Honors to the decisions of the Supreme Court of Panama, except to say that they all state the law to the effect that Article 2526 refers to ordinary prescription, to-wit: prescription under title to property or prescription of ten years.

We feel that we have taken too much of the time of the Court in discussing Judge Jackson's mistakes. They have all since been set right. First, by the Circuit Court of Appeals; second, by Judge Jackson's successor, who tried the case after it was remanded, in order to more fully find the facts; third, by the Circuit Court of Appeals on the second appeal.

We, therefore, respectfully submit that the judgment of the Circuit Court of Appeals of the United States in this case should be affirmed.

EDWIN T. MERRICK,
RALPH J. SCHWARZ,
Of Counsel.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1922

No. ~~572~~ 113

DOMINGO DIAZ, ET ALS,
Appellants,

versus

GUILLERMO PATTERSON,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

Motion to dismiss or affirm

BRIEF IN BEHALF OF GUILLERMO PATTERSON, DEFENDANT AND APPELLEE.

E. T. MERRICK,
R. J. SCHWARZ,
Of Counsel.

Montgomery-Anderson Printing Co., Inc., 317 Chartres Street, N. O., La.

INDEX TO BRIEF.

Page.

Motion to dismiss 1

Statement of the Case 4

AUTHORITIES CITED.

Equity Rule No. 75 .....2, 3, 10, 11

United States Revised Statutes 1010..... 9

TABLE OF CASES.

Bodkin v. Edwards, No. 495 of Docket of Supreme Court United States, October Term, 1920, decided February 28, 1921, reported United States Supreme Court Advance Opinions No. 10, page 342, April 1, 1921 .....9, 10

City of Houston v. Southwestern Bell Telephone Company, Nos. 219-220 Docket of United States Supreme Court, October Term, 1921, reported Supreme Court Reporter Advance Opinions No. 16, page 489, July 1, 1922.....12, 13

Consolidated Gas Company of New York v. Charles D. Newton, No. 288 of the Docket of United States Supreme Court, October Term, 1921, reported United States Supreme Court Advance Opinions No. 11, page 307, April 15, 1922.....11, 12

Dierning v. Carlisle Packing Company, 226 U. S., 102 9

Diaz, et al., v. Patterson, 262 Fed., 899.....2, 4, 9

Diaz v. Patterson, 281 Fed., 394..... 2, 8

Texas & Pacific v. Prater, 229 U. S., 177..... 9

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1922

No. 572

DOMINGO DIAZ, ET ALS,

Appellants,

versus

GUILLERMO PATTERSON,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF IN BEHALF OF GUILLERMO PATTERSON, DEFENDANT AND APPELLEE.

Now comes Guillermo Patterson, appellee, and moves the Court to dismiss the appeal in this case, for the reasons:

(1) That no questions of law or fact are involved in this case, all questions of law having been decided by the

Court of Appeals for the Fifth Circuit on February 9, 1920, in the case of *Patterson v. Diaz, et al., No. 3282*, of the docket of said Court, and no appeal having been taken from said judgment; that on said date the case was remanded in order that the Judge of the District Court should fix the boundaries only of the property in contest, and the appellants in this case acquiesced in said judgment.

That said Judge of said District Court did fix said boundaries and thereupon the plaintiffs in this case again sued out an appeal to the Circuit Court of Appeals for the Fifth Circuit, and although no error was assigned upon the finding by the trial Judge that the record title was in appellee, and although it was not seriously contended in the Circuit Court of Appeals on said second trial that there was no testimony to support the findings of fact.

That upon said second appeal to said Court of Appeals for the Fifth Circuit the said Court, in suit No. 3835 of its docket, entitled *Diaz et al. v. Patterson*, affirmed the findings of the District Court for the Canal Zone.

(2) That none of the testimony in this record on the second trial in the District Court was reduced to narrative form in the Court of Appeals, or in this Court, as required by Equity rule 75, although the said record of testimony takes up six hundred pages of the printed transcript.

(3) That the original petition, exceptions and answers, and the original pleadings and judgment of the District

Court are entirely missing from the record before this Court, and no praecipe was filed with the clerk of the District Court, as required by Equity rule 75, so that the diminution of the record is entirely the fault of plaintiff and appellant.

That for the foregoing reasons the said appeal is clearly frivolous and oppressive, and should be dismissed, or the judgment of the Circuit Court of Appeals for the Fifth Circuit, appealed from should be affirmed, with 10% damages, as being clearly sued out for delay.

E. T. MERRICK,
R. J. SCHWARZ,
Attorneys for
Guillermo Patterson.

Please take notice that on the _____ day of _____ 1922, the motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereon. Annexed hereto is a copy of the brief of Appellee in support of this motion.

E. T. MERRICK,
R. J. SCHWARZ,
Attorneys for
Guillermo Patterson.

STATEMENT OF THE CASE.

This is an action brought by Domingo Diaz against Guillermo Patterson, claiming title to certain real estate situated in the Canal Zone.

The title of Guillermo Patterson runs back to 1695, but on the first trial of this case in the United States Court of Appeals, and in the lower Court, both the title and the prescription by possession were pleaded, and the Judge of the District Court of the Canal Zone decided this case in favor of Domingo Diaz and against the appellee, Guillermo Patterson, on October 24, 1918, decreeing that Domingo Diaz was entitled to the property in controversy, being a large portion of the plantation of the said Patterson. The case was appealed to the United States Circuit Court of Appeals for the Fifth Circuit, and the judgment of the District Court was reversed, and the case was remanded for the purpose of having the Judge of the District Court of the Canal Zone locate the boundaries of the property, in accordance with the opinion of the Court. On said first trial in the Circuit Court of Appeals, the Court said:

> "It appears from the record that the decree appealed from was based upon the conclusion that the plaintiffs had acquired by prescription the ownership of the land sued for, without that land having been possessed by them, or by any one through whom they claimed, and though their petition did not assert the claim that they were by prescription entitled to that land. The Court erred in so concluding.

"What has been said indicates the grounds which are deemed to support the conclusion reached that the case was disposed of on a theory inconsistent with the law applicable to the facts disclosed by the pleadings and the evidence adduced. There was conflicting oral testimony as to the possession of the land in dispute. There was such evidence tending to prove that the defendant and those to whose rights he succeeded were, for more than 30 years immediately preceding the bringing of the suit, continuously and uninterruptedly in possession under claims of ownership of land which the decree appealed from adjudged to the plaintiffs. If that evidence was such as to require a finding in accordance with it, a result would be that the defendant was entitled by prescription to disputed land so possessed. There was no finding for or against what that evidence tended to prove. Such evidence, and that in conflict with it, can be weighed by the trial Court better than by this Court. A good deal of the oral testimony, as it is disclosed by the record before us, is unintelligible, because nothing in the record, including the maps which have been made a part of it, enables us to determine the location of places and objects mentioned by witnesses. The proper determination of issues of facts presented calls for the weighing of oral testimony by the tribunal before which that testimony was given. The record discloses that, in consequence of a misconception of what is the law applicable to the case, this was not done in the trial now under review.

"For the reasons indicated, the conclusion is that this Court, without undertaking to pass on the conflicting evidence, should reverse the decree and re-

mand the cause for further proceedings not inconsistent with this opinion; and it is so ordered.

"Reversed."

Patterson v. Dias, 262 Fed., 903, 904.

Under these explicit instructions, when the case was remanded to the Judge of the District Court for the Canal Zone, Judge Hanan, who replaced Judge Jackson, the Judge who first decided the case in the lower Court, found the facts to be in favor of Guillermo Patterson, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72.

The plaintiffs in this case, on the second trial before the United States Circuit Court of Appeals, never questioned, and could not question, the fact that the findings of the District Court judge were based on evidence. The case was remanded for the trial Judge to find the facts and he did so. The appellants cannot contend that there was not a great deal of evidence tending to show the title and possession of defendant and appellee, but if this were not conclusive, the plaintiff and appellant did not except to the following findings of the trial Judge:

"24. The Court finds as a matter of fact that the defendant has established a recorded title to all the lands in controversy from the present time by an unbroken chain of title to the original grant from the Spanish Government to Tomasa Ramos, the defendant's predecessor in interest, in the year 1696." *68, 69.*

(See the twelve so-called assignment of errors, pages 118, 119, 120, 121.)

No exception was taken to this finding of fact.

"28. That by virtue of a petition of one Mrs. Catalina Lewis de Paredes as heir of one Ramon G. de Paredes, the Estate of Lo de Caceres was sold at auction by the first Circuit Judge of Panama Republic of Colombia; and at said sale said estate was purchased by the said Mrs. Catalina Lewis de Paredes; she receiving as vendor the same money which she deposited with the Judge as vendee. That said sale was opposed by the defendant, Guillermo Patterson, for the reason that in the advertised notice of sale a part of the land of Mata Redonda was included, but the Judge who made the sale refused to allow the defendant to intervene or oppose the same upon the grounds that a Revolution was in progress, and by executive decree the Courts were closed for all civil litigation.

"That on account of this simulated sale by Mrs. Catalina Lewis de Paredes to herself, a title was recorded to Lo de Caceres estate, including the lands now in dispute, to Mrs. Catalina Lewis de Paredes; but the said Catalina Lewis de Paredes did not enter into possession of the lands in dispute and exercised no acts of possession over them, but all of this time the defendant, Guillermo Patterson, was in actual, open, hostile, notorious and adverse possession of all of the lands in dispute, and through his predecessors in interest has been in such possession uninterruptedly since the year 1790."

"29. That thereafter, the said Catalina Lewis de Paredes, by public deeds, conveyed to her children eight-ninths of the estate of Lo de Caceres, and thereafter, she and her said children conveyed the

entire estate of Lo de Caceres, including the lands in dispute, to General Domingo Diaz, the predecessor in interest of the plaintiffs herein." (pp. 69, 70.)

No exception was taken to these findings of fact.

The opinion of the Circuit Court of Appeals for the Fifth Circuit, covers the case fully on this point. We, therefore, quote this opinion in full *(261 Fed., 394)*:

"The case is fully stated in 262 Fed., 899, upon a former appeal. There a decree in favor of the original plaintiffs and present appellants was reversed, and the case remanded for findings upon the evidence as to possession of the land in dispute.

"Upon the evidence then in the record, and upon additional evidence taken since, the trial Court has found that the original defendant Patterson, appellee here, has been in actual adverse possession for more than 30 years, and, further, that appellants have never been in possession of the lands in dispute. The Court also finds as a fact that appellee established record title.

"Appellants do not assign error upon the finding that record title is in appellee, nor is it seriously contended that there was no testimony to support the other findings of facts. Some contention is made as to the credibility of witnesses for appellants, but the District Judge heard the witnesses testify, and also viewed the lands. There is abundant evidence to support the finding of fact as to appellee's possession, but no useful purpose would be served by setting it forth.

"The principal argument for reversal of the decree below is upon the question of law decided upon the former appeal. It is again argued that the mere recording of a deed by one claimant interrupts the actual possession of an adverse claimant under a previously recorded title. We are convinced that this is not the law, and adhere to our former opinion.

"The decree is affirmed."

Diaz v. Patterson, 281, Fed., 394.

We think under repeated decisions of this Court that the findings of the District Court, at least when affirmed by the Court of Appeals, will not be disturbed, and we think the Court will allow the appellant damages for a frivolous appeal, under R. S. 1010. *Dierning v. Carlisle Packing Co., 226 U. S., 102; Texas & Pacific v. Prater, 229 U. S., 177.*

The law of this case was passed upon by the Court of Appeals and the case was remanded to fix the boundaries, and plaintiffs did not appeal to this Court on the law, when the questions of law were decided in the first opinion *(Diaz v. Patterson, 262 Fed., 903)*, but acquiesced therein, and went back to the Canal Zone to take testimony to fix the boundaries. These boundaries having been fixed by the District Court, and having been approved by the Circuit Court of Appeals, will not be disturbed by your Honors, and the judgment will, we think, be affirmed, with damages, under the repeated decisions of this Court. We regard the case of *Bodkin v. Edwards, No. 495* of the docket

of this Court, decided in the October term of 1920, on February 28, 1921, as conclusive. Mr. Justice Van Devanter in that case says:

> "The motion to dismiss must be denied and the one to affirm sustained. The case, as presented here, turns essentially on question of facts. Both Courts below, on a review of the evidence, have found the facts in the same way. This Court, under a settled rule, accepts such concurring findings unless clear error is shown. Page v. Rogers, 211 U. S., 575, 577, 53L. Ed., 332, 333, 29 Sup. Ct. Rep., 159; Washington Securities Co. v. United States, 234 U. S., 76, 78, 58 L. Ed., 1220, 1222, 34 Sup. Ct. Rep., 725; Wright-Blodgett Co. v. United States, 236 U. S., 397, 402, 59 L. Ed., 637, 639, 35 Sup. Ct. Rep., 339; National Bank v. Shackelford, 239 U. S., 31, 60 L. Ed., 158, 36 Sup. Ct. Rep., 17. No such error is shown by the record before us. Besides, it does not contain all the evidence that was before the Courts below, a part having been omitted under the appellant's specification of what should be included. In these circumstances, to retain the case for oral argument in regular course would result in harmful delay and serve no useful purpose.
>
> "Decree affirmed."
>
> *Bodkin v. Edwards, U. S. Supreme Court Advance Opinions, No. 10, April 1, 1921, p. 342, decided February 28, 1921.* 255 U.S. 223

We would, therefore, prefer to have the appeal affirmed with damages, though the appeal could very well be dismissed, for the reason that no praecipe was filed in ac-

cordance with the 75th Equity Rule, paragraph (a), and record obviously omits the first pleadings filed in the case, plaintiffs' suit, defendant's exceptions and answers, the opinion of the Court, and the judgment of the Court, which were passed upon in the first appeal, quoted in the 262d Federal Reporter, at pages, 899, 900, 901, 902, 903 and 904. The plaintiff and appellant has not made the slightest effort to comply with Equity Rule 75 (b), as your Honors will see from the first six hundred pages of the printed record, since there has not been the least attempt made to reduce the evidence to narrative form. The only reason that the remaining evidence was reduced to narrative form, namely, the last seven hundred pages, was because the first judgment rendered by Judge Jack, Judge of the District Court for the Canal Zone, was adverse to the defendant in this case, who was forced to take an appeal to establish his rights, and took the trouble to comply with the rules of the Supreme Court.

In the case of *Consolidated Gas Company* of New York against *Charles D. Newton, No. 288*, of the docket of the October term of 1921, decided on March 6, 1922, the Court says, through Justice McReynolds: 258 U.S. 173, 174

> "Equity Rules 75 and 76 direct that records on appeal shall not set forth the evidence fully, but in simple, condensed form, and require omission of non-essentials and mere formal parts of documents. Without apparent attempt to comply with these rules, and with assent of appellee's counsel, appellants in No. 257, have filed a record of 21 volumes,

—twenty thousand printed pages—made up largely of stenographic reports of proceedings before the master, with hundreds of useless exhibits and many thousand pages of matter without present value. This is indefensible practice, which we shall hereafter feel at liberty to punish to the limit of our discretion, possibly by dismissal of the appeal. These rules were intended to protect the Courts against useless, burdensome records, and litigants from unnecessary costs and delay. Counsel ought to comply with them, and trial Courts should enforce performance of this plain duty."

Newton v. Consolidated Gas Co., U. S. Supreme Court Advance Opinions, 1921-1922, No. 11, April 15, 1922, page 307, decided March 6, 1922. 258 U.S. 165

In a later case, namely, the *City of Houston v. Southwestern Bell Telephone Co.*, decided on May 29, 1922, being Nos. 219-220 of the docket of this Court, of the October term of 1921, your Honors affirmed the judgment and said:

"(6) Equity Rule No. 75 (33 Sup. Ct., XI) provides that evidence to be included in the record shall not be set forth in full but shall be stated in a simple and condensed form, and rule 21 of this Court (32 Sup. Ct., X) provides that briefs of the argument shall be filed in each case, with references to the pages of the record and the authorities relied upon in support of each point. The first of these rules has been wholly ignored in the printing of this record and the second has been so neglected in the preparation of the briefs that it is impossible for the Court to consider this question except by itself

reading and briefing the voluminous record. This we cannot consent to do, and for the reason that the record and briefs are not prepared in conformity with the rules prescribed by this Court, we decline to consider this assignment of error."

City of Houston v. Southwestern Bell Telephone Co., Supreme Court Reporter, Vol. 42, No. 16, July 1, 1922, page 489, decided May 29, 1922.

257 U.S. 318

In view of the foregoing authorities, we think the Court will see its way clear to affirm this judgment, with the damages for a frivolous appeal.

Respectfully submitted,

E. T. MERRICK,
R. J. SCHWARZ,
Of Counsel.

Office Supreme Court, U. S.
FILED
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WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 113.

DOMINGO DIAZ ET AL., APPELLANTS,

vs.

GUILLERMO PATTERSON.

BRIEF IN REPLY IN BEHALF OF GUILLERMO PATTERSON, APPELLEE.

EDWIN T. MERRICK,
RALPH J. SCHWARTZ,
Counsel for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 113.

DOMINGO DIAZ ET AL., APPELLANTS,

vs.

GUILLERMO PATTERSON, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN REPLY IN BEHALF OF GUILLERMO PATTERSON, DEFENDANT AND APPELLEE.

We have read with astonishment plaintiffs' petition in this case. They have attempted in this court to urge that other parties than the plaintiffs and the defendant are interested in the decree of the lower court, and that proper parties were prayed for by the plaintiff and not made in the lower court.

They say they asked for these parties in interest to be brought before the court. Among other things, they quote in their brief, page 3, from the prayer of the amended petition as follows:

> "That the defendant be required to set forth the nature of his claim, *and that all adverse claims be determined by this Court*, that by said decree it be declared and adjudged that plaintiffs are the owners of said lands and entitled to the possession thereof, and that defendant has no estate nor interest whatever in or to said land, and that defendant be forever barred from asserting any claim whatever in and to said land and premises adverse to plaintiffs, and for such other and further relief as to equity shall seem meet and proper."

The old record is not before the court, but we have a copy with us and will leave it with the clerk.

This petition cannot be found in the present record, but by turning to the original or old Circuit Court of Appeals' record, on page 8, your Honors will find that the statement is not true, for the reason that three important words which entirely change the character of the prayer have been omitted and the correct prayer reads as follows:

> "Wherefore, plaintiffs pray judgment that the defendant be required to set forth the nature of his claim, and that all adverse claims OF THE DEFENDANT be determined by decree of this Court, and that by said decree it be declared and adjudged that plaintiffs are the owners of said lands and entitled to the possession thereof, and that defendant has no estate nor interest whatever in or to said land and premises, and that defendant be forever debarred from asserting any

claim whatever in and to said land and premises adverse to plaintiffs, and for such other and further relief as to equity shall seem meet and proper; and plaintiffs will ever pray."

Your Honors will see that the omission of the words "of the defendant" in plaintiffs' quotation disposes of plaintiff's argument altogether. Nor is this all. The plaintiff shows that there was never any claim made by plaintiff that there were any other parties than plaintiffs and defendant interested in this case (First Record, 7, 12th paragraph). The entire suit is leveled against Guillermo Patterson, and it is made clear that no one else has an interest (First Record, p. 8). They admit this because in the amended petition filed April 14, 1921, they directed their claim solely against defendant (R., 14, 10th paragraph).

The first part of the quotation on page 5 of the brief of plaintiff is not in the first record, though some such claim is made in different language and not as quoted. The opinion of the learned judge, who has now become the advocate of the plaintiff, is entirely missing from the record. This is alone ground for motion for dismissal or affirmance. We hesitate very much to discuss opponent's brief, because it is based upon parts of the record not brought up in this case.

Plaintiff's original petition and the opinion of Judge Jackson deciding this case in favor of Diaz cannot be found in the Supreme Court record.

They are not before the court, but since our adversary has cited them and they formed a proper part of the transcript, we have to refer to the old Court of Appeals record without waiving our right to dismiss or affirm.

An inexcusable error will also be found on pages 6 and 7 of plaintiff's brief.

They quote from the U. S. Circuit Court of Appeals decision (Patterson v. Dias, 262 F., p. 900), a citation from Art. 2520 of Civil Code of Canal Zone—leaving out the last clause of the article—and they say the Circuit Court omits that last part of article in its citation of it. This is not true.

Plaintiff's case seems to be based upon two points. The first point, the want of proper parties, can be disposed of on the following grounds:

First. That in every rule of pleading the plea of want of proper parties should be filled in *limine litis*.

Second. There is no record before this court of any adverse claimants.

Third. If any adverse claimants to these proceeds of the sale of defendant's real estate in the Canal Zone are missing, it is because the plaintiff did not make proper parties, and the omission is attributable entirely to him.

Fourth. That the trial court found, as a fact, that the disposal of $26,160 in the registry of the court belonged to the defendant as between plaintiff and defendant (Second Finding of Fact, R., 62), and

Fifth. It's none of plaintiff's business as to where the proceeds of the sale of this property goes, since it has been adjudged that he has no interest in it, and adversaries, on page 19 of their brief, say that "It was the duty of the court on its own motion to cite all parties when its attention was called to the matter." The answer to this is that the attention of the court was never called to the claim of any other parties by plaintiffs.

The second point is that the Court of Appeals erred in reversing Judge Jackson's decree on the first appeal and erred in reaffirming the established law of the case on the second appeal by what is called an erroneous opinion. To this we answer, first, that the judgment of the Court of Appeals on the first appeal established the law of the case, and that judgment has never been appealed from and is *res judicata*. An almost similar case was decided by your Honors in the case of the Last Chance Mining Company v. Tyler Mining Company, 157 U. S., p. 690. In the first litigation between the Last Chance Mining Company and the Tyler Mining Company it was claimed by one of the parties that they had a prior claim on the mine. An answer was filed by the other party and subsequently withdrawn, but a decree was rendered in the case declaring, according to the writer's recollection, that the Last Chance Mining Company had the prior right. Subsequently the litigation was renewed between the parties and the appellate court permitted the parties to open up the case as to priority of claim, and upon an appeal to this court your honors held that the first decision was *res judicata*.

We don't think it needs any argument to urge this court to hold that in the first decision, when the U. S. Circuit Court of Appeals laid down the law of the case and no appeal was taken from that to this court, so, when the second appeal was taken and the Court of Appeals sustained its previous decision, it did only that which it had to do, because, as between the parties, the judgment was final as to the law.

Our second answer to the point that the Court of Appeals erred is that the judgment was correct and in accordance to the law of the Canal Zone because it was the first decision rendered, so far as we know, on that subject. It was correct

as to the law of the Republic of Panama, because notwithstanding the decision cited by our learned adversary there have been many other and previous decisions directly to the contrary from the courts of Columbia and the courts of the Republic of Panama.

The Supreme Court of Columbia, in an opinion handed down on September 6, 1894, states:

> "4339. The provision in Section 2526 of the Civil Code, according to which acquisitive prescription of real property does not obtain against a recorded title, except by virtue of another recorded title, is applicable only when dealing with ordinary prescription, since it is then only when the prescriber needs a registered title in order that his possession may be considered as regular possession; but dealing with extraordinary prescription there is no necessity of any title any more (Sec. 2531); it suffices in this case that the one who alleges prescription should show that his possession has been neither violent nor clandestine, and that it has been continuous for thirty years. This is called extraordinary prescription because it is beyond the rules set forth for other kinds of prescription.
>
> "If Section 2526 should always be applied to the letter rigidly referring to both ordinary and extraordinary prescription, the latter as a matter of fact would be extinguished and thus there would be a contradiction to the philosophical principle and to the principle of justice on which prescription is based, which from its origin in the Usucaption of the Romans to our days has as main object the avoidance of law suits and to give firm basis to property. Without prescription no one could be sure of his property, on account of the difficulty in presenting the rigorous chain of deeds by which his predecessors in interest acquired the land from the beginning of time; and those among us who

would have bought the real property by means of a private instrument (as it was permissible under the Spanish Legislature), and would have lost that instrument, would have no means of defense against the usurper who would snatch his property away from him. (Jurisprudence de los Tribunales Superiores de Columbia, page 334.)"

This question has also been settled by the Supreme Court of Panama on October 5th, 1892, as follows:

"4306. For acquisitive prescription there are five essential requirements in order that it should exist, which requirements are admitted likewise in Roman, Spanish, and in our own civil Legislature. They are as follows: 1, just title; 2, good faith; 3, continuous possession; 4, prescriptibility of the thing, and 5, lapse of time fixed by the statute of limitation. (Jurisprudencia de los Tribunales Superiores de Columbia, page 336.)"

Without the above-mentioned requirements no one can acquire land by prescription, no matter how nor when his title was recorded. Actual possession and all other requirements are necessary for ordinary prescription according to Section 2526 of the Civil Code, Canal Zone, and then prescription begins to be counted from the date of the last record of the two original titles, and only in favor of the one who has actual possession besides, being their right otherwise thoroughly equalized. This has also been specifically determined by the Supreme Court of Columbia in an opinion handed down on May 25, 1896, as follows:

"4291. It is not enough to have a registered title in order that prescription should begin in one's favor; it is necessary besides to be really and truly in actual

physical possession of the thing; because possession, the basis of prescription, must be clearly shown before the eyes of those who could believe themselves to be owners, by means of open acts, the same that the true owners would exercise daily, such as sowing, fencing, renting and others which imply domain. (Jurisprudencia de los Tribunales Superiores de Columbia, page 333.)"

We have already called your Honor's attention to the fact that the Supreme Court of Panama, in an action of trespass brought by the plaintiff in this case, Diaz, decided in unequivocal language that the possession of Mata Redonda to the Portobello road has been in Mr. Patterson for a long period of time (R., 779, 780)."

While we are on the subject of possession, we wish to call attention to our adversaries' brief, to what he says, page 5:

"First, both parties claim actual physical possession and there was proof tending to show actual physical possession in each of undetermined parts and at various periods.

"Second, it is doubtful if actual physical possession of the whole is shown or can by legal requirements be shown in either by actual physical possession of parts."

These two quotations, we think, are so misleading, in so far as they attempt to cast a doubt on defendant's *possession* of the property, that we must call the court's attention to them. By looking at the original record your Honors will find that Judge Jackson admitted the possession of defendant in the opinion by the following:

"There does not seem to be any doubt whatever that the defendant *had acquired by* 1869 *by pre-*

scription a portion of the lands purchased in 1832 by the plaintiff's predecessors in interest, but the question to decide is whether title so acquired continues to the present time."

He then goes on to say that by reregistry of title the plaintiff regained what they had lost by prescription, though he admitted that Patterson, the defendant, was in possession all this time.

We also claim that the opinion of the United States Circuit Court of Appeals as to the property in question, being the first one rendered, is controlling and particularly it is the law of the *situs*.

The courts have decided that this land belongs to Patterson. The solicitude of the plaintiff for other claimants is wasted. Our experience is that other claimants, if there are any, are perfectly capable of looking after their own rights. We had heard that the plaintiffs were making every effort known to human ingenuity to prevent the defendant from getting possession of the property. We hardly thought, however, that they would attempt to bring to bear the influence of a minister of a foreign country on the highest court in this or any other land. Our idea was that claims made by one government upon another were made through the Department of State, but the letter to the clerk of the highest court of our land, written by the minister of the Republic of Panama and published in our adversaries' brief, page 17, seems to be something new in the history of our courts.

Respectfully submitted,

EDWIN T. MERRICK.
RALPH J. SCHWARZ.

Dated Nov. 27, 1923.